APPENDIX.

In *Benjamin D. Harris* v. *William Hardeman, et al.*, 14 How. 334, the case was one brought to the Supreme Court by a writ of error from the Circuit Court of the United States for the Southern District of Mississippi. Therein the defendants in error moved the Circuit Court to quash a forthcoming bond, executed by the defendants to the plaintiff, and to set aside the judgment upon which the bond was founded upon the ground that the forthcoming bond was taken in execution of a judgment entered against the defendant Hardeman, when in truth there had been no service of original, or mesne, process upon him to warrant such judgment. The motion was granted upon the ground of lack of service and was affirmed by the Supreme Court.

In *Stevirmac Oil & Gas Co.* v. *C. E. Dittman*, 245 U. S. 210, Dittman brought suit in the United States District Court for the Eastern District of Oklahoma against Stevirmac Oil & Gas Co. and Virgil Hicks, to recover a money judgment. On December 1, 1913, the court rendered judgment by default against Stevirmac Oil & Gas Co. About eighteen months thereafter the latter company filed an application to set aside the default judgment, it being contended that the court had no jurisdiction to render judgment on account of lack of jurisdiction of the person of the defendant. The court refused to set aside the judgment and overruled the application of Stevirmac Oil & Gas Co. The question presented in the Supreme Court was whether the judgment of the District Court could be reviewed by direct writ of error from the Supreme Court to the District Court. The Supreme Court said:

> "But the attempt now made is to convert the writ of error into a means of reviewing the question of the jurisdiction of the court to render the original judgment. * * * The writ of error must be dismissed, and it is so ordered."

Swift & Co. v. *United States,* 276 U. S. 311, was initiated by the filing by the government of a petition under the Sherman Anti-Trust Act to enjoin violations of that statute and of the Clayton Act, with the object of putting to an end the monopoly ascribed to the defendants and to deprive them of the instrumentalities by which they were perfecting their attempts to monopolize. The petition sought a comprehensive injunction. Simultaneously with the filing of the petition, all of the defendants filed answers denying material allegations of the bill, but at the same time a joint stipulation was filed providing that without any finding of fact the court might enter the proposed decree therein set forth. This was done. Later motions to vacate the decree were filed in the case and were overruled by the District Court and an appeal prosecuted to the Court of Appeals for the District of Columbia. That court certified five questions to the Supreme Court, and the latter ordered that the entire record be certified to it, and upon consideration of the case upon its merits it held that it would assume jurisdiction of the case. After considering the several questions presented, it affirmed the decree of the District Court refusing to vacate the decree.

SEP 10 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 102.

THE ATLANTIC REFINING COMPANY, *Petitioner*,

v.

JAMES B. BERRY SONS' COMPANY, INC., *Respondent*.

RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF.

THOMAS G. HAIGHT,
WILLIAM F. HALL,
Counsel for Respondent.

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RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF.

In answer to petitioner's reply brief we desire to submit as follows:

POINT I.

Petitioner's Reply is Inconsistent Regarding the Purpose of Its Second Petition.

Petitioner first denies and then admits that the instant petition is addressed to the judgment of September 27, 1939, *which this Court refused to review.*

On page 1 of its reply brief, petitioner in substance denies that a review of the judgment of September 27, 1939, is its ultimate object. On page 3 of its brief, however, it is said: "* * * the instant petition seeks the setting aside of the purported judgment of September 27, 1939, * * *."

Manifestly the essential difference between the two petitions is that the earlier one is bottomed upon one ground, and the instant petition is bottomed upon another ground. *Both grounds are exhibited by the record filed with the first petition.*

The reason petitioner *elected* not to urge in its first petition (filed November 22, 1939) the point which is advanced in its second petition (filed May 25, 1940) is not explained.

We may assume either that petitioner considered the point to be without merit when it filed its first petition, or that it realized that a favorable action thereon bottomed on this point would, at best, ultimately lead only to a return of the case to the Circuit Court of Appeals for rehearing on its merits, and that eventuality petitioner wished to avoid.

Petitioner, having lost its attack upon the judgment of September 27, 1939, based upon the merits of the case, now occupies an "any port in a storm" position and, perforce, advances the point previously withheld.

To countenance such procedure would be to invite litigants to speculate upon the outcome in this Court of certiorari petitions and to encourage the filing of successive petitions limited in number and date only by the ingenuity of counsel to conjure up additional potential grounds of attack upon an adverse judgment.

POINT II.

The Instant Petition is Barred by Laches.

Petitioner, having lost its motion *for rehearing* belatedly filed in the Circuit Court of Appeals (submitted about *three months* subsequent to the expiration of the period provided by rule 27 of the rules of the Circuit Court of Appeals for the Third Circuit for the presentation of petitions for rehearing), now says that said motion was not for a rehearing (it was so termed by the Circuit Court of Appeals) but was a motion to vacate the judgment of Sep-

tember 27, 1939, and that there is no time limit for filing such a motion, unless indeed the delay amounts to laches. It suggests no yardstick for measuring laches. Irrespective of the name by which the motion calls itself, it was, as the Circuit Court of Appeals said, a petition for rehearing; vacating the judgment alone would have been an idle gesture. But assuming the distinction suggested by petitioner, rule 27 of the Circuit Court of Appeals nevertheless furnishes an appropriate yardstick for determining laches in such case.

However, 28 U. S. C. 350 presents a barrier which petitioner has made no attempt to and cannot hurdle.

POINT III.

Justice and Equity Dictate that on the Record in this Case the Judgment of the Circuit Court of Appeals Should Not Be Disturbed.

Petitioner's "any port in a storm" attitude is further shown by its grotesque assertion at page 10 of its reply brief to the effect that equity and justice demand that the whole refining industry should be blanketed by a monopoly under a patent found to be invalid by a decree of a District Court entered, after an open court trial, by an eminent judge of long experience, and from which decree *but a single member* of the Circuit Court of Appeals dissented in the *ultimate* disposition of the case by that Court.

We submit that the above caption is warranted by the following:

(a) After an open court trial and the submission of printed briefs and oral arguments, the District Court found the patent in suit invalid because what it claims involves mechanical skill only, and was anticipated by others, and filed a written opinion to this effect and appropriate findings of fact and conclusions of law.

(b) Rule 52 of the Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Many cases are to the same effect; among them, *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, and *Butte & S. Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12.

(c) Of the three judges who sat in the Circuit Court of Appeals on the several arguments which were had, Judge Buffington only was in disaccord with the decree of the District Court in the final disposition of the case on its merits by the appellate court.

(d) Judge Buffington wrote the initial opinion of the latter Court and the reasons given therein for the ultimate conclusion expressed were wholly discarded in the subsequent opinions of the Court.

(e) In the final conclusion of the Court, both Judge Biggs and Judge Dickinson[1] were in accord with District Judge Gibson, and Judge Buffington only was contrary-minded.

(f) In denying *per curiam* the petition for rehearing, the Court said that Judge Buffington had joined in authorizing the entry of the order of September 27, 1939, which is signed by Judge Biggs.

We submit that the facts recited preclude petitioner from gaining any advantage by the death of Judge Dickinson, which occurred after the final argument but prior to the mere ministerial act of entering the judgment of the Court, and *refute petitioner's assertion that justice and equity will be defeated if the District Court's decree is not reversed.*

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[1] There has been no suggestion of falsity in Judge Biggs' statement that Judge Dickinson participated in the decision. The statement is corroborated by the circumstance that Judge Buffington's opinion is termed a "dissenting" opinion and that he joined in the entry of the judgment affirming the decree of the district court.

Point IV.

It Would Be Supererogation to Give Extended Consideration to the Many Citations in Petitioner's Reply Brief.

In support of the foregoing caption we submit (a) what is said under Point II herein, and (b) that the great number of citations in petitioner's reply brief and the emphasis which it places upon *Florida Motor Lines* v. *Hill* are convincing that it has been unable to find *a decision of a Federal Court* in which a holding is made contrary to the explicit statements contained in the two Federal Court decisions cited by respondent, *i. e., Hook* v. *Mercantile Trust Co.,* 95 Fed. 41, and *United States* v. *Bentley & Sons Co.,* 293 Fed. 229. In the reply brief it is said that respondent relies upon "dicta" in these two cases. Petitioner evidently failed to note that *Florida Motor Lines* v. *Hill,* which it so strongly presses, purports to be based mainly upon *ratio decidendi,* which, moreover, was misunderstood. In the decision in the last named case, there is emphasized the following (143 So. 262):

(a) That "petitions for rehearing are *under our rules*[1] filed and considered as ex parte matters"; and

(b) That the court was "controlled by the *ratio decidendi*" of *Carmichael* v. *Eberle,* 177 U. S. 63, and acted "upon the authority of that case."

The rules of practice of the Supreme, Circuit and County courts of Florida, in respect to applications for rehearing (rule 25), expressly provide that "the court will consider the petition without argument." In contradistinction in the case at bar, *petitioner did file an argument* opposing the allowance of the petition for rehearing; a fact to which petitioner does not allude.

The Supreme Court of Florida in *Florida Motor Lines Lines* v. *Hill* manifestly *misunderstood* the facts in *Carmichael* v. *Eberle.* The latter is not an authority for the holding in the former.

The *ratio decidendi* of the *Carmichael* case is that upon the consideration of *an application* to an appellate court

[1] Italics ours.

for a rehearing of its own judgment, if there is an equal division of the members of the court *on the question whether the rehearing should be allowed,* then that question must be resolved in the negative. Since the application was denied in the case under consideration, necessarily the judgment of the court which had been attacked remained unaffected and this Court so held. In the *Carmichael* case this Court expressly said, "The contention of plaintiff in error is that a rehearing *was granted,*[1] and that, as the court was equally divided on such alleged rehearing, the judgment of the district court was affirmed."

This Court did not reject as unsound the point of law involved in this contention. *But it found that a rehearing had not been granted.* We submit that had this Court found petitioner's fact contention justified, it would not have found it unsound in law.

We suggest that the formal granting of a rehearing by a Circuit Court of Appeals in respect to its own judgment, after the consideration of printed arguments submitted by the respective parties, as occurred in the case at bar, if it does not have the effect of completely vacating its judgment so that thereafter the cause stands as if no judgment had been entered, as stated in effect in *Hook* v. *Mercantile Trust Co.* and *United States* v. *Bentley & Sons,* does, at least, cast such doubt upon the soundness of the judgment that unless it is reaffirmed by a majority of the members participating in the final disposition of the case, the measure of certainty of error is not present necessary to justify the reversal of the district court.

CONCLUSION.

It is respectfully submitted that the present petition should be denied.

Respectfully submitted,

THOMAS G. HAIGHT,
WILLIAM F. HALL,
Counsel for Respondent.

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[1] Italics ours.